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THE LAW OF THIRD PARTY BENEFICIARIES IN PENNSYLVANIA

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The American Law Institute has undertaken to "restate" the common law of the United States. Mr. Justice Holmes, the Nestor of American legal scholarship, has recently said that there is no such common law.¹ He thinks that it is "an unconstitutional assumption of powers" for the courts of the United States to attempt to establish such a common law in a state whose courts have declared a different law. His statement has much logical

¹"Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeal, from the State Courts, from England and the Colonies of England indiscriminately, and criticize them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else." Mr. Justice Holmes in *Black & White Taxi & T. Co. v. Brown and Yellow Taxi & T. Co.*, 48 Sup. Ct. 404 (1928).

and practical force. There is no such "unconstitutional assumption of powers," however, on the part of the American Law Institute. The reason for this is that it assumes to have no power whatever, except the power that is derived from influence on the minds of men. Its work represents an effort on the part of men throughout the entire country to create a common law in place of variation and conflict. No doubt the effort has presented itself to many minds as merely an attempt to state an already existing universal system of rules. This may indeed explain why it has been dubbed a "*Restatement*." But even though we must admit that these United States possess no august *corpus juris*, it seems certain that the fallacy of its existence is accompanied also by a strong general desire for its existence. No doubt, with our present political organization it is impossible to attain the object of this desire. It is not impossible, however, for the American Law Institute, if supported by the sentiment of the bench and bar throughout the country, to make very substantial progress toward the establishment of a common law, especially by clarifying certain portions of the law that are now most confused and productive of unnecessary litigation, and by definitely choosing one rule out of a number of competing rules in cases where there is now conflict of decisions.

One such field of law in which the Institute has attempted a clarification and has made a choice is to be found in Chapter 6 of the proposed *Restatement of the Law of Contracts*, entitled "Contractual Rights of Persons not Parties to the Contract." For several centuries, at least, there have been two directly conflicting doctrines: one, that a contract made by two parties for the benefit of a third may create enforceable rights in that third person; the other, that one not in "privity of contract" has no enforceable right. These conflicting doctrines have kept the minds of lawyers and judges confused and uncertain and have therefore led to an immense amount of wholly unnecessary litigation. They have led, also, to a considerable amount of direct conflict in decision, although a close study of the cases will show that, so far as actual decisions go, the courts have succeeded remarkably in reaching consistent results that accord with the sense of justice

of the community. The result that they have reached involves the total abandonment of the second of the conflicting doctrines; and this result has been "restated" by the American Law Institute in Chapter 6 referred to above. "Privity of contract" is not required for the creation of a contractual right. If this is the result that has actually been attained by the decisions, it is time to abandon the repetition of the misleading doctrine. It is time to quit explaining decisions as being based upon exceptions where they are in fact in accordance with a generally prevailing rule.

There is no state in which these statements are more thoroughly applicable than in Pennsylvania. Not only are both of the conflicting doctrines continually repeated as if they were both correct, but there are opposing lines of decisions not capable of any reasonable reconciliation. In case the court chooses to adopt one of the conflicting doctrines rather than the other, it has at times cited the one line of authority without any reference to the other. This situation exists even at the present time, although in a few of the more recent cases the problem has been attacked with much vigor and intelligence. The authorities are in such a condition that the Supreme Court of Pennsylvania can without difficulty lend its support to the effort of the American Law Institute. By so doing, not only would the court assist greatly in the effort to create a common law of the United States; but it would also clarify the law of Pennsylvania itself and enable lawyers to advise their clients without taking every case all the way to the Supreme Court.

There are a few other jurisdictions in which the courts have been slower than the courts of Pennsylvania to give effect to the doctrines accepted by the Law Institute. For example, it has been supposed that England, Massachusetts, Connecticut, Michigan, and the federal courts have persisted in requiring "privity of contract." In these jurisdictions there have probably been more approving repetitions of this doctrine than in other states. It is not certain, however, that their actual decisions are so very different. No doubt lawyers have been to some extent discouraged from bringing suits on behalf of third party beneficiaries, although the number of such cases brought and the number of

such cases won by the plaintiff will surprise any one who makes a study of the law of those jurisdictions. The present writer has previously reviewed the law of Connecticut;² and the Supreme Court of that state has in a recent case put the law of the state in substantial harmony with that prevailing elsewhere as stated by the Law Institute.³ The result of the writer's investigations in the law of these other exceptional jurisdictions may be briefly stated. In practically all the states not here specially mentioned, the courts are in substantial agreement with the American Law Institute.

The conflict in the English law was supposed to have been settled by the striking case of *Tweddle v. Atkinson*.⁴ It may be dogmatically asserted that this is not true. The facts in that case were such as to make the decision shocking to anyone who is not a worshipper of mere legalistic logic and who believes that it is the function of the courts to create and administer the law on the basis of existing social mores. The courts of England, while appearing at times to worship at the shrine of legalistic logic, have, nevertheless, been able in a very considerable degree to reach results in direct conflict with the decision in *Tweddle v. Atkinson*. They have done this chiefly by expanding the concept of a "trust." Where a contract has been made by two parties for the benefit of a third, they have declared that the promisee is a "trustee" for the third person, and have recognized and enforced a right in the third person against the promisor. They adopted this method because the tradition of the law required no "privity" in cases where a beneficiary could be described as a "*cestui que trust*." By putting the case within the field of trust law they

² Corbin, *Contracts for the Benefit of Third Persons in Connecticut* (1922) 31 YALE L. J. 489.

³ Baurer v. Devenis, 99 Conn. 203, 121 Atl. 566 (1923). For full clarification, it will still be necessary for the court to abandon the theory that the rights of numerous creditor beneficiaries are "in equity"; but this is a matter of terminology and not of substantive law.

⁴ 1 B. & S. 393 (1861). The fathers of a bride and groom contracted with each other that they would pay named amounts to the young bridegroom to help the couple start in life; and they specifically provided that he should have a legally enforceable right. Yet the court held that the bridegroom could not maintain assumpsit against the executor of one of the promisors. *Contra*: Dutton v. Poole, 2 Lev. 210 (1677); Oldham v. Bateman, Rolle Abr. 31, pl. 8 (1637); Provender v. Wood, Hetley 30 (about 1630).

could enforce the right of a contract beneficiary without appearing to deny the frequently approved doctrine that contract beneficiaries have no rights. In these cases the beneficiary's right was enforced by a bill in equity brought in his own name;⁵ and it could be enforced in a common law action, provided it was brought in the name of the promisee for the use and benefit of the third party.⁶ Since the *Judicature Act* there is no good reason for refusing to let the beneficiary bring an action in his own name.⁷ If, prior to that act, the Court of Chancery recognized and enforced a right in the beneficiary, it is incumbent upon the High Court of Justice to do exactly what the Court of Chancery formerly did. This has actually been done by the House of Lords in the last case of this sort that came before it.⁸ Since the decision is, in fact, inconsistent with an earlier decision in the same House, it may perhaps be explained with the usual amount of specious distinctions. The earlier case was not cited by the learned Lords or even indirectly referred to.

The law of Massachusetts has been reviewed in recent treatises on the law of contracts.⁹ There is an increasing number of recent decisions in which the court gave judgment to the plaintiff, although he was clearly not in "privity of contract" with the

⁵ *Tomlinson v. Gill*, Ambler 330 (1756); *Gregory v. Williams*, 3 Merivale 582 (1817); *Moore v. Darton*, 4 DeG. & Sm. 517 (1851); *Touche v. Metrop. Ry. W. Co.*, L. R. 6 Ch. App. 671 (1871); *Mulholland v. Merriam*, 19 Grant Ch. 288 (Ont. 1872) (an enlightening case). The beneficiary joined as plaintiff with the promisee and got a decree for specific performance in *Peel v. Peel*, 17 W. R. 586 (1869), and *Hohler v. Aston*, [1920] 2 Ch. 420.

In *Faulkner v. Faulkner*, 23 Ont. R. 252 (1893), the court said definitely that there was no "trust"; but it decreed payment to the beneficiary.

⁶ The damages are measured by what the beneficiary suffers, not by those of the promisee. *Lamb v. Vice*, 6 M. & W. 467 (1840); *Robertson v. Wait*, 8 Ex. 299 (1853).

⁷ *Lloyd's v. Harper*, 16 Ch. D. 290 (1880); *In re Flavell*, 25 Ch. D. 89 (1883); *Drimmie v. Davies*, [1899] 1 Ir. R. 176.

⁸ *Les Affrèteurs v. Walford*, [1919] A. C. 801, approving *Robertson v. Wait*, 8 Ex. 299 (1853). A shipping agent was given judgment for his commission against a charterer who had contracted in writing with the shipowner to pay the commission. The promisee was called a "trustee" for his agent, the plaintiff. The inconsistent case of *Dunlop Tyre Co. v. Selfridge & Co.*, [1915] A. C. 847, was not mentioned. Apparently the "trustee" expedient was not thought of by the lawyers for the Tyre Company. Their oversight ought not have been fatal.

⁹ ANSON, *CONTRACTS* (Corbin's ed. 1924) § 299; WILLISTON, *CONTRACTS* (1920) § 367.

defendant.¹⁰ The earlier Massachusetts law was definitely in harmony with the *Restatement* of the Law Institute; and recent Massachusetts decisions can easily be regarded as having brought the modern law of the state a good distance in the same direction.

The Supreme Court of Michigan seemed to be consistently following the doctrine that third party beneficiaries had no enforceable rights. It was even said that such was the case in equity as well as at law. The court decided in accordance therewith in some cases that are as shocking to the conscience as was the decision in *Tweddle v. Atkinson*.¹¹ Finally, however, a case came before it in which the judges could not endure the thought of maintaining logic at the expense of justice to the plaintiff. Where a wife conveyed a dower interest in land in return for her husband's promise to give certain property and support to their blind and incapable daughter, the court sustained an action by this daughter after the mother's death. Having first rested the decision on a statutory provision that was merely procedural in its effect, the court on rehearing chose instead to rest the decision upon the fact that the blind girl was present when the parents were contracting and heard her father's promise. This, said the court, created sufficient "privity" to satisfy the requirements of their general doctrine.¹² If the requirement of "privity" can be

¹⁰ *McNamara v. McGuire*, 254 Mass. 589, 150 N. E. 862 (1926) (state construction bond for benefit of laborers and materialmen, statutory); *Goulding v. Phinney*, 234 Mass. 411, 125 N. E. 703 (1920) (building restriction covenant for benefit of other lot owners); *Gardner v. Denison*, 217 Mass. 492, 105 N. E. 359 (1914) (an extreme case of donee beneficiary); *Collins v. Collins*, 212 Mass. 131, 98 N. E. 588 (1912) (specific performance decreed in favor of an heir of the promisee); *Forbes v. Thorpe*, 209 Mass. 570, 95 N. E. 955 (1911) ("asset" theory in favor of a creditor beneficiary); *Phinney v. Boston El. Ry.*, 201 Mass. 286, 87 N. E. 490 (1909) (promise to a city to keep pavements in repair); *Grime v. Borden*, 166 Mass. 198, 44 N. E. 216 (1896) (promisee a "trustee"); *Palmer Sav. Bank v. Insurance Co.*, 166 Mass. 189, 44 N. E. 211 (1896) (fire insurance policy payable to mortgagee); *Nims v. Ford*, 159 Mass. 575, 35 N. E. 100 (1893) (life insurance beneficiary, based on statute); *Paper Stock D. Co. v. Boston D. Co.*, 147 Mass. 318, 17 N. E. 554 (1888) (fiction that plaintiff was a promisee); *Fay v. Guynon*, 131 Mass. 31 (1881) (a donee beneficiary sued in the name of the promisee against the latter's will and got substantial damages although the promisee suffered none); *Adams v. Adams*, 96 Mass. 65 (1867) (devise on condition). See also *N. Y. Central Ry. v. Central Vt. Ry.*, 243 Mass. 56, 136 N. E. 825 (1922). In no modern case, however, has the general requirement of "privity" been denied.

¹¹ See *Linneman v. Moross*, 98 Mich. 178, 57 N. W. 103 (1893); *Knights of Maccabees v. Sharp*, 163 Mich. 449, 128 N. W. 786 (1910).

¹² *Preston v. Preston*, 205 Mich. 646, 172 N. W. 371 (1919), 207 Mich. 681, 175 N. W. 266 (1919).

satisfied as easily as this, the next step should surely be to abandon the ridiculous requirement. The Michigan court has, in a still more recent case, decided in favor of a beneficiary of a contract between two mutual subscribers to a fund, even though the facts were not such as to make heartstrings vibrate.¹³

With respect to the federal courts it must now be said that they are applying the law of the respective states.¹⁴ Here, at least, the views of Mr. Justice Holmes referred to above are amply sustained. In the Supreme Court of the United States itself, there are cases in which an action at law, as well as a suit in equity, has been sustained in favor of the third party beneficiary.¹⁵ The cases in the circuit court of appeals and in the district courts are now extremely numerous; and in nearly all of them judgment was given for the plaintiff.¹⁶ Some of these

¹³ *Clark Masonic Assn. v. Colman's Estate*, 222 Mich. 599, 193 N. W. 219 (1923). See also *Palmer v. Bray*, 136 Mich. 85, 88, 98 N. W. 849, 850 (1904); *Richelieu & O. Nav. Co. v. Thames, etc., Ins. Co.*, 58 Mich. 132, 24 N. W. 547 (1885); and MICH. COMP. LAWS (1915) § 12680, giving a right to mortgagees.

¹⁴ *Federal Sur. Co. v. Minneapolis S. & M. Co.*, 17 F.(2d) 242 (C. C. A. 8th, 1927) (applied Montana law against the plaintiff while sitting in Minnesota); *Duval-Percival Trust Co. v. Jenkins*, 16 F.(2d) 223 (C. C. A. 8th, 1926) (applied Missouri law in favor of the plaintiff while sitting in Kansas, the Kansas law being against the plaintiff).

¹⁵ *Hendrick v. Lindsay*, 93 U. S. 143 (1876); *Union Life Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437 (1892) (mortgagee sued at law on an assumption of the mortgage debt by the defendant, and the court applied Illinois law); *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. 445 (1901) (Arizona law); *Hagan v. Scottish Ins. Co.*, 186 U. S. 423, 22 Sup. Ct. 862 (1902) (beneficiary of marine insurance policy issued to X "for whom it may concern" joined with X and got judgment).

A long line of cases gives the most liberal application to the Act of Aug. 13, 1894 as amended, 28 STAT. 278 (1894), 33 STAT. 811 (1905), 36 STAT. 1167 (1911), 40 U. S. C. § 270 (1926), in favor of laborers and materialmen on public contracts. See *Brogan v. Natl. Sur. Co.*, 246 U. S. 257, 38 Sup. Ct. 250 (1918); *Illinois Sur. Co. v. Peeler*, 240 U. S. 214, 36 Sup. Ct. 321 (1916).

In *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494 (1890), a mortgagee beneficiary got a decree on the theory of subrogation. The dicta as to remedies "at law" are of the older sort. The statements in *National Bank v. Grand Lodge*, 98 U. S. 123 (1878), half-dictum as they are, are no longer molding the law.

¹⁶ The following are selected out of a long list of cases in which the Circuit Courts of Appeal or District Courts held in favor of the beneficiary: *Dunn v. Clinchfield Ry.*, 19 F.(2d) 810 (C. C. A. 6th, 1927) (at law for a tort); *Compagnie Francaise v. Bonnassee*, 19 F.(2d) 777 (C. C. A. 2d, 1927) (in admiralty); *First N. Bank v. Caples*, 17 F.(2d) 87 (C. C. A. 5th, 1927) (at law on a surety bond); *Collins Mfg. Co. v. Wickwire Steel Co.*, 14 F.(2d) 871 (D. C. Mass., 1927) (in equity, on an "asset" theory); *Smith & Co. v. Wilson*, 9 F.(2d) 51 (C. C. A. 8th, 1925); *Mobile S. Co. v. Federal B. & S. Co.*, 280 Fed. 292 (C. C. A. 7th, 1922) (at law); *Gooch v. Buford*, 262 Fed. 894 (C. C. A. 6th, 1920) (donee beneficiary, at law); *Dancel v. Goodyear Shoc Mach. Co.*, 144 Fed. 679 (C. C. A. 2d, 1906) (in equity).

cases were on the equity side of the court; but many others were not. The federal courts now purport to apply the law of the state which governs the rights of the parties, both with respect to the substantive law and with respect to the question whether the right is "legal" or "equitable." There are a few cases that cannot be reconciled with the majority; and, of course, there are innumerable inconsistent dicta and statements of general legal doctrine. Generally, these merely reflect the conflict or inconsistency existing in the law of the states that are involved.

PENNSYLVANIA LAW

At first, just as was the case in England, Massachusetts and elsewhere, it was recognized that two persons could by contract create rights in a third. The rule was laid down and has been continually repeated that he for whose benefit a promise is made may maintain an action upon it although the promise was not made directly to him and no consideration was given by him.¹⁷ Very soon, however, distinctions began to be drawn. The leading case, one that is cited more often than any other, is *Blymire v. Boistie*, decided in 1837. In this case a debtor sold certain land to the defendant, receiving in return the defendant's promise to pay the price to the promisee's creditor in satisfaction of the promisee's debt to such creditor. In a suit by the creditor on this promise the court gave judgment for the defendant, saying that the contract was made for the benefit of the promisee and not for the benefit of the plaintiff.¹⁸ This is in direct conflict with

¹⁷ "The right of the plaintiff to recover does not depend upon privity of contract. 'It is a rudimental principle, that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself.'" *Merriman v. Moore*, 90 Pa. 78 (1879), quoting from *Hoff's App.*, 24 Pa. 200, 205 (1855).

¹⁸ "Where one person contracts with another to pay money to a third, or to deliver over some valuable thing, and such third person is thus the only party in interest, he ought to possess the right to release the demand, or recover it by action. But when a debt already exists from one person to another, a promise by a third person to pay such debt, being for the benefit of the original debtor, and to relieve him from the payment of it, he ought to have a right of action against the promisor for his own indemnity; and if the promisor were also liable to the original creditor, he would be subject to two separate actions at the same time, for the same debt, which would be inconvenient, and might lead to injustice." *Blymire v. Boistie*, 6 Watts 182, 184 (Pa. 1837). See also *Cummings v. Clapp*, 5 W. & S. 511 (Pa. 1843).

the leading New York case of *Lawrence v. Fox*,¹⁹ decided some twenty years later; and if it had been consistently followed, no creditor beneficiary would have a directly enforceable right on a promise to his debtor to pay the debt. However, it has not been consistently followed, although it has never been formally disapproved; and it has been cited with apparent approval in Pennsylvania more often than any other single case.²⁰ The reason for this is that the court expressly recognized the general rule that a third party for whose benefit a contract is made can enforce the contract. The case can therefore be plausibly cited as authority in any other case in which the court is willing to hold that the contract in question was made for the benefit of the plaintiff, even though the facts of the case in question are substantially parallel to the facts in *Blymire v. Boistle* and the decision being rendered is substantially in conflict with that decision.

The decisions and the reasoning of the courts have been so variable during 150 years that no uniform doctrine can be made from them; but the tendency is clearly towards a recognition of enforceable rights in both donees and creditors. In spite of a few modern cases, the tendency is clearly away from the decision in *Blymire v. Boistle*. The decision in that case should be recognized as being in direct conflict with a great many later cases and it should now be flatly and expressly disapproved.²¹

¹⁹ 20 N. Y. 268 (1859), now followed in a thousand cases throughout the country.

²⁰ The statement in *First M. E. Ch. v. Isenberg*, 246 Pa. 221, 225, 92 Atl. 141, 142 (1914), that the rule of *Blymire v. Boistle* has been "followed without deviation for more than three-quarters of a century" cannot be sustained as true except by making factual distinctions so confused and unsubstantial as to bring law into general disrepute. It is hiding one's head in the sand so as to be able to say, "I see no conflict." Similar misleading statements are made in *Freeman v. Penna. R. R.*, 173 Pa. 274, 279, 33 Atl. 1034, 1036 (1896).

The clearest recognition of the state of the law is found in *Brill v. Brill*, 282 Pa. 276, 127 Atl. 840 (1925), an excellent decision that should increasingly tend to clarify and modernize the Pennsylvania law.

²¹ The court said in *Finney v. Finney*, 16 Pa. 380, 383 (1851), "it was held that Boistle could not recover for want of privity. Yet in precisely such a case chancery would have decreed otherwise." If this was a true statement in 1851, no true contract beneficiary should lose his case in Pennsylvania now.

BENEFICIARIES CLASSIFIED; DONEES

The courts of the entire country usually say, as was said in *Blymire v. Boistle*, that if a contract is made for the benefit of a third person he has an enforceable right against the promisor. Doubt and conflict have grown out of the phrase "made for the benefit of." The court in *Blymire v. Boistle* did not deny the rule; instead it definitely asserted that the plaintiff need not be a promisee. But it was unable to see that the contract in question was made for the plaintiff's benefit. He was a creditor of the promisee; and the latter no doubt purchased the promise of the defendant in order to bring about the discharge of his own debt by a performance by the promisor. This question of a supposed intention to benefit the third person must be considered.

The cases within this field can be conveniently thrown into two classes. Cases not falling within them are complex and rare and will not be considered here. Third parties are classified as donee beneficiaries and creditor beneficiaries. If the performance promised by the defendant will, when rendered, come to the third person as a pure donation, he is a donee beneficiary. If, on the other hand, that performance will come to him in satisfaction of a legal duty owed to him by the promisee, he is a creditor beneficiary. In the donee cases the plaintiff has little difficulty in convincing the court that the promisee, in purchasing the promise of the defendant, had the purpose in his mind of conferring a benefit upon the third person to whom the performance was to go as a donation. Of course, purpose and intention can be proved only by the evidence of external manifestation; but in these cases that manifestation is thoroughly convincing. A decision in favor of a donee beneficiary, therefore, is merely an application of the express dictum of *Blymire v. Boistle*, as frequently repeated in other cases. The supreme court has recognized a right in the plaintiff in several cases of this sort;²² so that the dictum should be regarded as the well-established law of the state.

²² *Blymire v. Boistle*, 6 Watts 182 (Pa. 1837) *semble*; *Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741 (1888) *semble*; *Edmundson's Est.*, 259 Pa. 429, 103 Atl. 277 (1918) (conveyance of land for defendant's promise to pay money to the promisee's daughter); *Brill v. Brill*, 282 Pa. 276, 127 Atl. 840 (1925) (the promisee was under a legal duty to the plaintiff, but the case easily supports

CREDITOR BENEFICIARIES

What is the purpose of the promisee when he purchases a promise of the defendant to pay a debt owed by the promisee to the plaintiff? Clearly, it is not to make a donation of the payment, since such payment is to come in satisfaction of a debt; the third person will receive it at the cost of his claim against the promisee. If "made for the benefit of" means made with the purpose of conferring a gift upon somebody, the contract is not made for the creditor's benefit. But the phrase has not been given a single dictionary definition. The cases following *Lawrence v. Fox* (a creditor case), many of them in Pennsylvania as well as elsewhere, require us to give a meaning to the phrase other than that of intention to make a gift. The promisee certainly looks forward to the creditor's getting the money promised by the defendant. His ultimate motive and object of desire are no doubt benefit to himself. He wants freedom from debt. But he also desires the means by which this is to be brought about, and therefore contracts for it to take place. Without intending to make a gift to anyone, he desires and intends to induce the pay-

the rule in the text above); *Tasin v. Bastress*, 284 Pa. 47, 130 Atl. 417 (1925) (judgment in favor of *C* on a promise by *A* made to *B* to pay *C*'s debt to *D*); *Hoffa v. Hoffa*, 38 Pa. Super. 356 (1909); *Noren v. Star E. & S. Co.*, 34 Pa. C. C. 236 (1907). See also *McBride v. Western Pa. Paper Co.*, 263 Pa. 345, 106 Atl. 720 (1919) (the third party was present when the promise was made); and *Depuy v. Loomis*, 74 Pa. Super. 497 (1920).

Mallalieu's Est., 42 Pa. Super. 101 (1910), is *contra*, but the court doubted that any contract was made. *Blymire v. Boistle* is cited as if it were in accord, even though the general rule stated in that case is squarely against the decision being rendered.

In a very recent case some of these cases were reviewed; and they were said to establish various classes of new "exceptions." *Greene County v. Southern Sur. Co.*, 292 Pa. 304, 141 Atl. 27 (1927). But in donee beneficiary cases the exceptions do not merely prove the rule; they *make* the rule, and there are no decisions against it. The time has arrived to say so; and, indeed, in so doing the court will merely have to repeat the long honored express dictum of *Blymire v. Boistle*. The court, in the *Greene County* case, very sensibly said at 313, 141 Atl. at 31: "Whatever the objections to recovery by the sole beneficiary, they are insufficient to overcome the undoubted merit and justice of his cause." Of course, no one doubts that the beneficiary of a life insurance policy can maintain action thereon.

In *Guthrie v. Kerr*, 85 Pa. 303 (1877), the third parties had no rights as donee beneficiaries, because the defendant had made no promise to pay them although he had the option of performing his contract by paying them.

The donee beneficiary of an insurance policy, having an enforceable right against the insurer, becomes a creditor beneficiary of a reinsurance company's promise to the original insurer. See *Jones v. Com. Casualty Co.*, 255 Pa. 566, 100 Atl. 450 (1917).

ment by the defendant into the hands of the creditor. Although not a gift, this performance is beneficial to the creditor in that it puts a bird in his hands in the place of one in the bush. So therefore, the purposes of the promisee are being carried out by the courts when they give judgment to the creditor against the promisor and enforce it by execution in his behalf. Satisfaction of this judgment puts the bird in the hands of the creditor and discharges the promisee's debt to him. These are the intermediate and ultimate objects of desire by the promisee; and he is attaining them both without trouble or expense to himself. No one doubts that it is the duty of the promisor to the promisee to perform as he promised and thereby to exonerate the promisee from his debt to the creditor. Collection from the promisor by the creditor brings about this exoneration. It brings it about by means of one suit when otherwise two suits might be necessary; it cuts along the hypotenuse of the triangle. The creditor may, of course, compel the promisee to pay the debt himself; but it is most unjust on the part of the promisor to allow this to occur. Having paid the promisor once for the payment of the debt, the promisee should not be forced to raise funds a second time to discharge it, at the expense, in an extreme case, of bankruptcy and ruin. The intentions of the promisee are being carried out, his desires are being realized, and the convenience of society is being served by enabling the creditor to collect from the promisor. While it was thought in *Blymire v. Boistle* that it would be unjust to the promisor to throw him open to two suits on his promise, one by the promisee and one by the creditor, after a century of application of the rule in favor of the creditor no substantial injustice to the promisor has appeared. He has not in fact been sued twice; and if he fears a second suit, modern procedure is everywhere elastic enough to enable him to join the other possible plaintiff as a party to the first action that is brought.²³

The Pennsylvania court has recognized that creditor beneficiaries have enforceable rights in several classes of cases, these classes frequently being said to be "exceptions" to the general

²³ The court approved this view in *Baurer v. Devenis*, 99 Conn. 203, 121 Atl. 566 (1923).

rule. But cases should cease to be referred to as "exceptions" when there is no good reason for distinguishing them and where the cases so described cover substantially the whole field in which the supposed general rule operates.²⁴ The classes of such "exceptions" are: (1) assumptions of mortgage debts by grantees; (2) assumptions of a testator's debts by a devisee; (3) assumptions of debts by the purchaser of a business.

MORTGAGEE BENEFICIARIES

Prior to the *Act of June 12, 1878*,²⁵ it was clear that where a mortgagor sold land or chattels to a grantee who assumed payment of the debt, the mortgagee or pledgee could maintain an action against the grantee to enforce the promise.²⁶ This is still the law with respect to conveyances of mortgaged chattels, the Act of 1878 applying only in land cases.²⁷ That statute requires an assumption of the mortgage debt by the grantee of the mortgaged land to be in writing. Its purpose may have been to prevent the courts from holding, as they had been doing,

²⁴ This is recognized by Pound, J., in *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639 (1918).

²⁵ P. L. 205, §§ 1, 2, PA. STAT. (West 1920) §§ 18854, 18855.

²⁶ *Hoff's Appeal*, 24 Pa. 200 (1855) (The grantee's assumption of the mortgage debt was held to make him a debtor of the mortgagee, who, the court said, could maintain assumpsit); *Lennig's Est.*, 52 Pa. 135 (1866) (same); *Merriman v. Moore*, 90 Pa. 78 (1879) (assumpsit by the mortgagee sustained).

"It was nothing to Cochran's vendees what the former did with the purchase-money. He saw proper to apply a portion of it to the payment of the mortgages which bound the land conveyed, although they imposed no personal liability upon him. A vendor may direct how the purchase-money shall be paid. He may reserve it to himself, donate it to a public charity, or may make such other disposition of it as may best meet his views, and if his vendee agrees to pay it according to such directions, he cannot set up as a defense that his vendor was under no duty to apply it in such manner. The difficulty in the way of the defendants is, that the evidence rejected would go to show that they have not paid the purchase-money. The right of the plaintiff to recover does not depend upon privity of contract. 'It is a rudimental principle, that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself.'" *Merriman v. Moore*, 90 Pa. 78, 81 (1879).

²⁷ The Act of June 12, 1878, *supra* note 25, "is expressly limited to transactions arising on sales of real estate" and does not affect an assumption of a debt secured by a mortgage or pledge of personal property. "If the parties so intend, it will create a personal liability by the grantee to the holder of the encumbrance . . . and if necessary recovery may be had in the name of the vendor to the use of the encumbrancer." *Gill's Est.*, 268 Pa. 500, 503, 502, 112 Atl. 80, 81 (1920) (pledgee's claim against the grantee's estate held valid). This was approved in *Lowry v. Hensal*, 281 Pa. 572, 127 Atl. 219 (1924).

that a grantee was personally bound to pay the mortgage debt, when all that he had done was to buy the land "subject to" the mortgage.²⁸ The statute provides that he must "by an agreement in writing, have expressly assumed a personal liability therefor." There is the further provision, however, that "the right to enforce such personal liability shall not enure to any person other than the person with whom such an agreement is made, nor shall such personal liability continue after the said grantee has *bona fide* parted with the encumbered property, unless he shall have expressly assumed such continuing liability."²⁹ This appears in form to deny the mortgagee any right to payment by the mortgagor's grantee, or by any subsequent party, even though the latter has expressly promised the mortgagor or his immediate grantor to pay the mortgage debt. In spite of the statute, however, such an assumption contract necessarily makes the promisor the principal debtor and the promisee only a surety that the debt will be paid.³⁰ This being so, justice is best done and the social convenience is best served by allowing the creditor, the mortgagee, to enforce payment by the one upon whom ultimately the burden

²⁸ In *Kirker v. Wylie*, 207 Pa. 511, 512, 56 Atl. 1074 (1904), the court said: "The purpose of the act of 1878 was to relieve the grantee from an implied liability arising from the use of the words 'under and subject.'"

In *Lennox v. Brower*, 160 Pa. 191, 28 Atl. 839 (1894), it was held that the Act of 1878 was not applicable against a mortgagor suing his grantee on the latter's oral promise to pay the purchase price of the land, even though that promise was to pay the mortgage debt. Inasmuch as the promise of a grantee to assume and pay the debt is practically always a promise to pay the agreed price of the land, this decision greatly narrows the application of the statute.

In *May's Est.*, 218 Pa. 64, 67 Atl. 120 (1907), the words "under and subject to" the mortgage were held to be an implied promise by the grantee to indemnify the grantor against the mortgage debt, just as had been held prior to the Act of 1878. Very surprisingly, the court said, at 70, 67 Atl. at 122, that the act "does not affect the liability of the grantee to his grantor, but only applies to the relations between the grantee and the holder of the incumbrance." But the decision was against the grantor on the ground that he showed no loss and was therefore entitled to no decree of indemnity against the grantee.

²⁹ Act of June 12, 1878, *supra* note 25. *Kirker v. Wylie*, 207 Pa. 511, 513, 56 Atl. 1074 (1904), held in a suit by the grantor (the promisee) that an express agreement to pay the debt would bind the grantee even after his subsequent conveyance, because "it was as much a continuing liability as an obligation to pay a fixed sum of money and it could be discharged only by payment." But without any reference in this case, the court held in *Sloan v. Klein*, 230 Pa. 132, 79 Atl. 403 (1911), that after the grantee has conveyed to another, without then assuming the continuing duty to pay the debt, the mortgagee cannot maintain *assumpsit* against him.

³⁰ See *Lowry v. Hensal*, 281 Pa. 572, 127 Atl. 219 (1924).

must fall. This is amply established by the almost universal practice in other states to sustain an action by the mortgagee. In spite of the express words of the statute, it seems that in Pennsylvania the mortgagee can enforce the assumption contract if he sues in the name of the promisee.³¹ The troublesome provision in the statute that compels this formality of procedure ought to be repealed.

CONDITIONAL DEVISES

Where a testator devises land on condition that the devisee shall pay money to a third person, it has been held that the acceptance of the devise is by implication a promise to pay the money on which the third person can maintain action.³² The third person may be either a donee or a creditor beneficiary. The only striking difference between such a devise and a conveyance *inter vivos* on the same terms is that acceptance by a devisee occurs after the death of the one who in other cases would be the promisee.

³¹ In *Lowry v. Hensal*, *supra* note 30, at 577, 578, 127 Atl. at 220, 221, the court threw out a bill in equity by the mortgagee because he had a remedy at law, saying that the mortgagee "may proceed against the mortgagor, or directly against the grantee," and that the grantee "assumes the payment of the debt and becomes personally liable, that liability can be enforced through an independent action at law in the name of the grantor." See also *Tritten's Est.*, 238 Pa. 555, 86 Atl. 461 (1913).

In *Blood v. Crew Levick Co.*, 171 Pa. 328, 334, 33 Atl. 344, 346 (1895), a grantee agreed to accept title "subject to the payment of the mortgages . . . but does not assume the payment of the . . . notes given for the debts secured by said mortgages." This was held to be a promise by the grantee to his grantor to indemnify him by paying the mortgage debt, and to make the grantor a surety for the grantee as principal debtor. The court said also at 334, 33 Atl. at 346: "We can see no reason why an action in the name of the covenantor might not have been brought upon it to the use of the party entitled to receive the money." This was repeated in *Gill's Est.*, 268 Pa. 500, 502, 112 Atl. 80, 81 (1920).

In an assumpsit against the mortgagor's grantee, it was held that the grantor could maintain action on the assumption of the debt. *Thomas v. Fourth St. M. E. Ch.*, 24 Pa. C. C. 642, 645 (1900). The court said that the action of assumpsit might be "by the grantor or in his name to the use of the person entitled to the money . . . in this case, the holder of the mortgage."

In *Fisler v. Reach*, 202 Pa. 74, 51 Atl. 599 (1902), the mortgagee sued the grantee in the name of the mortgagor and with his consent. Being called upon to show a warrant of attorney from the mortgagor, the mortgagee could not do this because the mortgagor had meantime "parted with whatever interest he had in the action." *Ibid.* 76, 51 Atl. at 599. For that reason the case was dismissed.

³² *Dreer v. Penna. Ins. Co.*, 108 Pa. 226 (1885); *Etter v. Greenawalt*, 98 Pa. 422 (1881) (promise to pay legatee); *Hoover v. Hoover*, 5 Pa. 351 (1847) ("the devisee became personally responsible.")

ASSUMPTION OF DEBTS BY PURCHASER OF BUSINESS

The case that has been most frequently litigated in Pennsylvania is one where a person sells his business assets to a purchaser and the latter promises to assume and pay the debts of the seller. There is no substantial difference in the facts, or in the policies involved, between this case and that of a mortgagee beneficiary or the specific case decided against the plaintiff in *Blymire v. Boistle*. In those cases the consideration received by the promisor is the conveyance of land by the promisee. Land often forms part of the "assets" of a business; but even if it does not, no reason is apparent for making a creditor's right depend upon the specific kind of consideration received by the promisor.³³ Nor should any distinction be attempted between the debt due to the creditor in *Blymire v. Boistle* and the debts due the creditor of one who is selling his business assets. In spite of *Blymire v. Boistle*, the clear weight of authority now is that the creditors of one who sells his business assets can maintain suit against the purchaser if the latter promises the seller to pay these creditors.³⁴ A

³³ In the Greene County case, *supra* note 22, the court said at 314, 141 Atl. at 31: "It may be the distinction between the consideration here involved that enables suit, and one where suit is denied is the augmentation of the promisor's estate." But this is a distinction that the courts have never taken and one that is out of harmony with the development of the law of consideration for promises. Benefit to a promisor has never been necessary to make his promise binding; and it should not now be used to separate one class of third party beneficiaries from another. Much less, of course, should there be any distinction between one kind of "augmentation" and another—between land and other kinds of business assets.

³⁴ *Commercial Bank v. Wood*, 7 W. & S. 89 (Pa. 1844) (decided partly on trust fund theory, but the promisee merely deposited a draft with the defendant who promised to pay a debt due to the plaintiff); *Bellas v. Fagely*, 19 Pa. 273 (1852); *Townsend v. Long*, 77 Pa. 143 (1874); *Wynn v. Wood*, 97 Pa. 216 (1881); *White v. Thielens*, 106 Pa. 173 (1884); *Delp v. Bartholomay Brewing Co.*, 123 Pa. 42, 15 Atl. 871 (1888); *Sargent v. Johns*, 206 Pa. 386, 55 Atl. 1051 (1903); *Cox v. Phila. Pottery Co.*, 214 Pa. 373, 63 Atl. 749 (1906); *Howes v. Scott*, 224 Pa. 7, 73 Atl. 186 (1909); *System Co. v. Lycoming Co.*, 46 Pa. Super. 499 (1911); *Kenyon Co. v. Sutton*, 50 Pa. Super. 445 (1912); *International Harv. Co. v. Stoker*, 34 Pa. C. C. 186 (1907).

In *Wray v. Bowman*, 74 Pa. Super. 479 (1920), an agent was given judgment on the buyer's promise to the seller to pay the agent's commission. The price of the land certainly did not constitute assets belonging to the agent.

In *Howes v. Scott*, 224 Pa. 7, 73 Atl. 186 (1909), *L* conveyed an interest in land to the defendant and the latter promised to pay a debt that *L* owed the plaintiff. It was held that the plaintiff could enforce the promise. This case is exactly like *Blymire v. Boistle* and in direct conflict with it. *Bruce v. Howley*, 29 Pa. Super. 169 (1905) (exactly the same).

shorter line of cases, however, is directly in conflict with this.³⁵ Sometimes a halting effort has been made to reconcile the decisions; but usually the court was content to cite a few of those that are in harmony with the decision then being rendered. The right of the creditor in these cases is usually recognized and enforced on the "asset" theory so common in other states. The defendant has received assets to which the plaintiff is said to have some sort of "title." This theory was equally applicable in *Blymire v. Boistle*, the only difference being that the assets received by the promisor consisted of land rather than land, stock-in-trade, and goodwill. This "asset" theory is merely one of the various methods taken by many courts to escape from the doctrine that third parties cannot enforce a contract, without appearing to deny the validity of the doctrine. Of course, if the assets transferred, whether they consist of land or chattels or choses in action, are accepted by the transferee as a trust fund out of which he undertakes to pay the claims of creditors, the creditors are beneficiaries of a trust and have the rights and remedies both in equity and at law that are customarily available to a *cestui que trust*. The transferee is not a debtor, bound to pay out of his own pocket; he is a trustee who owes merely the duty of faithful administration of the fund. In that fund, the creditors may be said to have some "title" or "property." Of course, many such cases can be found in every state.³⁶ But in the cases now under

After the defendant has promised to pay certain creditors of the promisee, he cannot be successfully garnisheed by another creditor of the promisee as to the amount promised. *Vincent v. Watson*, 18 Pa. 96 (1851).

³⁵ *Ramsdale v. Horton*, 3 Pa. 330 (1846); *Torrens v. Campbell*, 74 Pa. 470 (1873); *Kountz v. Holthouse*, 85 Pa. 235 (1877); *Adams v. Kuehn*, 119 Pa. 76, 13 Atl. 184 (1888); *Freeman v. Penna. R. R.*, 173 Pa. 274, 33 Atl. 1034 (1896); *Crown Slate Co. v. Allen*, 199 Pa. 239, 48 Atl. 968 (1901); *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347 (1914). The last five are cases where the defendant assumed the debt of another for a consideration beneficial to the defendant moving from the debtor. They can not be reconciled with the cases in the preceding note. It should be remembered that generally no conflict is acknowledged in the opinions. The late case of *Brill v. Brill*, 282 Pa. 276, 127 Atl. 840 (1925), is an exception.

³⁶ The following are cases where the defendant in fact held property in trust for a plaintiff: *Hind v. Holdship*, 2 Watts 104 (Pa. 1833); *Beers v. Robinson*, 9 Pa. 229 (1848); *Justice v. Tallman*, 86 Pa. 147 (1878); *Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741 (1888); *McAvoy v. Com. Title Co.*, 27 Pa. Super. 271 (1905). *Sparks v. Hurley*, 208 Pa. 166, 57 Atl. 364 (1904), was a gift of shares of stock, the defendant promising to hold them for the benefit of the plaintiff.

consideration there was no trust fund. The "assets" that are transferred belong to the transferee to do with as he pleases.³⁷ He owes no one a duty to conserve and distribute those "assets," and his duty to pay is not limited to their amount. No one but himself has any "title" to them.³⁸ It is very incompetent reasoning to say that the plaintiff has a "title" when there is no *res*, and all that the court does is to enforce a promise. If the plaintiff's "title" consists of nothing but his right against the defendant as a promisor, it is a beautiful argument in a circle to say that he has such a right because he has a title. The property and assets conveyed to the promisor are merely the consideration for his promise; they are not to be administered by him as a trust fund; and the defendant is a debtor, not a trustee.³⁹ The majority cases should be followed, but without using any "asset" or "trust fund" theory and without any attempt to distinguish the minority cases or *Blymire v. Boistle*.

³⁷ It is sometimes vaguely intimated that it would be a fraud on creditors for the defendant to take the assets and not pay the debts. But such fraud has to be proved before it can be assumed to exist; and in the cases here dealt with such a fraud is neither alleged nor proved. If such a fraud has been perpetrated, the remedy is a bill to recover the assets and to apply them properly. The actual relief given in the present cases is the enforcement of the defendant's express promise.

³⁸ This was specifically recognized in *Townsend v. Long*, 77 Pa. 143 (1874); *Delp v. Bartholomay Brewing Co.*, 123 Pa. 42, 15 Atl. 871 (1888); and *Greene County v. Southern Sur. Co.*, 292 Pa. 304, 141 Atl. 27 (1927). *Hind v. Holdship*, 2 Watts 104 (Pa. 1833), was the same in effect, the court holding that the amount of the consideration given by the promisee was not material.

³⁹ In *Adams v. Kuehn*, 119 Pa. 76, 85, 13 Atl. 184, 186 (1888), the court said: "Also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor. These cases as well as the case of one who receives money or property on the promise to pay or deliver to a third person, are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee." It is mere fiction to say that the third person "may fairly be said to be a party to the consideration." He gave not an iota of it. What the court means is that the plaintiff ought to get the money promised by the defendant. To say that "the title to the money . . . passes to the beneficiary" means merely that the court intends that he shall be paid the money. To say that the promisor is "in effect a trustee" is untrue; for the "effect" is quite otherwise. No accounting is required of the defendant and he would not be discharged by making one and showing that the assets are not sufficient. "In effect a trustee" means merely "the defendant is bound by his promise and the plaintiff has a right as beneficiary thereof." This reasoning is repeated in *Sargent v. Johns*, 206 Pa. 386, 55 Atl. 1051 (1903); *Bruce v. Howley*, 29 Pa. Super. 169 (1905).

CONTRACTORS' SURETY BONDS

There is another class of cases that is worth separate consideration, a class that is growing increasingly numerous. These are cases involving the surety bond of a contractor in which the surety promises the owner to pay laborers and materialmen, who become the creditors of the general contractor. These bonds are commonly exacted for the protection of the owner, the promisee, whether this owner is a private party or a municipal corporation. An additional purpose, however, is frequently to protect the laborers and materialmen. In some surety bond cases this fact was not recognized, or if recognized, was not given legal operation, and the third parties were denied a remedy on the bond.⁴⁰ To remedy this defect in the administration of justice, city ordinances and statutes were passed, the purpose of which was to give a remedy to laborers and materialmen against the sureties on the bond in the case of public contracts. It is now well established that if a statutory bond, or the statute under which the bond is executed, clearly states that it is made for the benefit of the third parties, as well as the promisee, the third parties can maintain an action upon the bond.⁴¹ There is a state statute, which in form follows an earlier city ordinance, giving cities the power to require a contractor to give "an additional bond" and providing that laborers and materialmen shall have an enforceable right on such bonds.⁴² The cities are not required to exercise this power, however, and the fact that "an additional bond" is not executed does not show that the third parties are intended

⁴⁰ *Greene County v. Southern Sur. Co.*, 292 Pa. 304, 141 Atl. 27 (1927); *Board of Ed. v. Mass. Bonding & Ins. Co.*, 252 Pa. 505, 97 Atl. 688 (1916); *First M. E. Ch. v. Isenberg*, 246 Pa. 221, 92 Atl. 141 (1914).

⁴¹ *Robertson Co. v. Globe Indem. Co.*, 268 Pa. 309, 112 Atl. 50 (1920); *Com. v. National Sur. Co.*, 253 Pa. 5, 97 Atl. 1034 (1916); *Phila. v. Wiggins*, 227 Pa. 343, 76 Atl. 31 (1910); *Phila. v. Nichols Co.*, 214 Pa. 265, 63 Atl. 886 (1906); *Phila. v. Neill*, 211 Pa. 353, 60 Atl. 1033 (1905); *Phila. v. Neill*, 206 Pa. 333, 55 Atl. 1032 (1903); *Phila. v. McLinden*, 205 Pa. 172, 54 Atl. 719 (1903); *Phila. v. Stewart*, 195 Pa. 309, 45 Atl. 1056 (1900), 198 Pa. 422, 48 Atl. 275 (1901) (creditors can maintain separate suits); *Robertson Co. v. Globe Indem. Co.*, 77 Pa. Super. 422 (1921); *Bowditch v. Gourley*, 24 Pa. Super. 342 (1904).

⁴² Act of May 10, 1917, P. L. 158, §§ 1, 2, PA. STAT. (West 1920) §§ 15854, 15855.

as beneficiaries of the one bond given for the protection of the promisee.⁴³

There are several additional cases, not falling in any of the classes discussed above, in which a creditor beneficiary has been held to have an enforceable right on the contract.⁴⁴ When all the cases, taken together, are considered, the result is that creditors as well as donees have enforceable rights. It is not necessary that the beneficiary should have given or be in any way connected with the "consideration" for the promise. There need be no "assets" or property in the hands of the promisor to which the third party has any "title," legal or equitable, real or imaginary. It must merely appear that the contracting parties expressed in some way an intention that the contract should be for the benefit of the third party or that they contemplated a performance that would satisfy an obligation owed by the promisee to the third party. Others who will be incidentally benefited have no rights on the contract.⁴⁵ The difficult line to draw is that between the

⁴³ *Erie v. Diefendorf*, 278 Pa. 31, 122 Atl. 159 (1923).

In *Lancaster v. Frescoln*, 192 Pa. 452, 43 Atl. 961 (1899), 203 Pa. 640, 53 Atl. 508 (1902), the suit was by the city (promisee) for the use of materialmen. In a previous suit the issues between the city and the contractor had been litigated, but this should not affect the rights of the "use plaintiff." The bond was held not to be for the benefit of materialmen. Some basis for this lay in the fact that a general ordinance required contractors to give "an additional bond" for the benefit of third persons; and this was not such a bond. It provided for the payment of materialmen, but it did not specify that it was a bond given for their use.

In an article to be published in the *YALE LAW JOURNAL*, the writer will attempt to show that laborers and materialmen should be treated as ordinary creditor beneficiaries, that this is generally recognized by Congress and the state legislatures, and that they are so treated by the great majority of the courts throughout the country even in the absence of statutes.

⁴⁴ *Ayers' Appeal*, 28 Pa. 179 (1857) (promise of a creditor to his debtor not to levy execution until after another creditor had made his levy); *Brill v. Brill*, 282 Pa. 276, 127 Atl. 840 (1925) (a sealed bond by a father to the mother of his illegitimate child, whom the mother was bound by statute to support, to pay money for the child's support); *Pittsb. Carbon Co. v. Phila. Co.*, 130 Pa. 438, 18 Atl. 732 (1889) (the defendant assumed the duty of another company to supply gas to the plaintiff).

⁴⁵ *Klingler v. Wick*, 266 Pa. 1, 109 Atl. 542 (1920), is a good example of a mere incidental beneficiary; a landowner's promise to a neighbor to let him use a switch on his land was held not to be for the benefit of the railroad company. In *Guthrie v. Kerr*, 85 Pa. 303 (1877), the plaintiff was merely the beneficiary of a power given to the defendant, the latter having made no promise to pay the plaintiff.

intended and the incidental beneficiaries, a difficulty that does not ordinarily arise in the case of creditors.

A hundred years ago the presence of a "seal" on the written contract would prevent a third party beneficiary from having a remedy.⁴⁶ This seems rightly to have been forgotten for a period;⁴⁷ but in a recent case it was revived as a make-weight for a decision that the court had reached on other grounds.⁴⁸

The time is fully ripe for the Pennsylvania court to say regularly and systematically, as well as to decide, that a creditor gets an enforceable right when other parties contract to pay him what may be due, even though benefit to the creditor is merely a desired intermediate object of the promisee. Such benefit need not be his ultimate motive or object of desire. An express recognition of the fact that numerous cases are in conflict with the decision in *Blymire v. Boistle* and a definite disapproval of that decision will considerably simplify the problem of the lawyer and the trial judge. It is certainly disapproved by the American Law Institute. Sufficient difficulty will be left, however, for there will still be "incidental" beneficiaries with no rights. Under the generally existing law today, the problem is not whether or not two persons can by contract create rights in a beneficiary. It is perfectly clear that they can. Instead, the question is where to draw the line between beneficiaries with rights and third parties to whom performance may be incidentally beneficial but who have no rights. This must be determined by the usual processes of interpretation. If the terms of the contract provide, either expressly or impliedly, that a third party shall have a right to the promised performance, the courts should give effect to the provision. If it appears that the promisee contracted for the promised performance as a donation to the third party, that party has an enforceable right. And

⁴⁶ *Strohecker v. Grant*, 16 S. & R. 237 (Pa. 1827); *Uhland v. Uhland*, 17 S. & R. 265 (Pa. 1828); *DeBolle v. Penna. Ins. Co.*, 4 Whart. 67, 74 (Pa. 1837).

⁴⁷ *Brill v. Brill*, 282 Pa. 276, 127 Atl. 840 (1925). *Shermet v. Embick*, 90 Pa. Super. 269 (1926), decides the other way, distinguishing *Brill v. Brill* because in that case the beneficiary was named as such in the instrument.

⁴⁸ *Greene County v. Southern Sur. Co.*, 292 Pa. 304, 141 Atl. 27 (1927).

if the contract is so made that the promised performance will discharge a duty of the promisee to a third party, that party can directly enforce the contract, since this procedure will attain the objects for which the contract was made at the least expense to the promisee and to society. In actions by the beneficiary there should be full realization that the promisee can easily be joined as a party if any of the parties concerned fears that otherwise his interests will not receive adequate protection.⁴⁹

⁴⁹ The Pennsylvania decisions are reviewed in (1928) 76 U. OF PA. L. REV. 594.